

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANTHONY W. BRUNO, Appellant,)	DOCKET NUMBER
)	AT08468910214
v.)	
OFFICE OF PERSONNEL MANAGEMENT, Agency.)	DATE: <u>APR 26 1981</u>
(CSA 2 989 739))	

Anthony W. Bruno, Birmingham, Alabama, pro se.

Reginald M. Jones, Jr., Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The Office of Personnel Management issued a reconsideration decision in which it found that the appellant was ineligible to make a retroactive election to transfer to the Federal Employees Retirement System (FERS). An administrative judge of the Board's Atlanta Regional Office issued an initial decision reversing the reconsideration decision, and the agency has filed a petition for review of the initial decision. For the reasons set forth below, we

GRANT the petition, REVERSE the initial decision, and affirm the reconsideration decision.

BACKGROUND

The Federal Employees Retirement System Act of 1986, Pub. L. 99-335, 100 Stat. 514 (1986) (FERA), as amended, established a new retirement system that includes Social Security coverage for Federal employees. Under this new system, Federal employees who were covered by the Civil Service Retirement System (CSRS) were given a one-time opportunity, from July 1, 1987, to December 31, 1987, to elect to transfer to FERS. See 42 U.S.C. § 402 note; 5 C.F.R. § 846.201(a).

This was the sole period provided by law during which an employee could elect to transfer to FERS. Belated elections were allowed by regulation of the Office of Personnel Management (OPM) only pursuant to the exception set forth at 5 C.F.R. § 846.204(a):

On determination by an employing office that the FERS transfer handbook issued by OPM was not available to an individual in a timely manner or an individual was unable, for cause beyond his or her control, to elect FERS coverage within the prescribed time limit, the employing office may, within six months after expiration of the individual's opportunity to elect FERS coverage under § 846.201, accept the individual's election of FERS coverage.

The "FERS Transfer Handbook -- A Guide to Making Your Decision" was the government's official source of transfer information. OPM provided the handbook to agencies for

distribution to all employees who were eligible to transfer from CSRS to FERS.

A major consideration of certain employees in making their choice between the two systems was the public pension offset (PPO), which was applicable to CSRS retirees. Under the PPO, if a Federal annuitant is eligible for Social Security benefits as a spouse or surviving spouse, that person's Social Security benefits are reduced. Under the FERS legislation as it existed in late 1987, the PPO was not to be applicable to FERS annuitants, although that provision was under debate. As it was signed into law on December 22, 1987, FERA provided that only if FERS coverage were elected on or before December 31, 1987, could the FERS annuitant avoid the PPO.

The appellant herein retired prior to January 1, 1988, and elected to remain in the CSRS. The belated request to transfer to FERS was denied because, *inter alia*, the FERS transfer handbook was available to the appellant. The administrative judge reversed that decision, however, in light of the confusion surrounding the PPO at the time of the appellant's retirement.

ANALYSIS

The Board has recently issued two decisions addressing an appellant's right to elect a belated transfer to FERS. In *Moriarty v. Office of Personnel Management*, MSPB Docket No. DC08468910097 (Mar. 13, 1991), it noted that the plain language of the regulation clearly limited the right to two

categories of individuals: Those who did not receive the FERS transfer handbook in a timely manner; and those who were unable, for cause beyond their control, to make a timely election. It found that OPM issued a July 9, 1987 letter to be distributed to all employees and a cover letter to agencies, advising them of the possibility that the PPO might be made applicable to FERS and suggesting delaying a decision to retire until later in the open season, when the matter might be clarified. The Board further found that any mischaracterization of the letter by an employing agency could not have deprived an employee who had the OPM letter of making an informed election; that the transfer handbook properly set forth all of the information available to OPM at the time, including that the PPO issue was under reconsideration; that the fact that the PPO provision was ultimately changed in a way different from that contemplated earlier did not amount to misinformation by OPM; that the appellant could have tracked the legislation through Congress and did not show that he could not have postponed his retirement decision until its passage; and that under such circumstances, the appellant was not entitled to elect FERS belatedly.

Similarly, in *Webb v. Office of Personnel Management*, MSPB Docket No. AT08468910174 (Mar. 13, 1991), citing *Frantz v. Office of Personnel Management*, 778 F.2d 783, 786 (Fed. Cir. 1985), the Board noted that the standard for determining whether an employee's election between retirement options was voidable due to improper information was whether a reasonable

person would have been confused in the particular circumstances. It concluded that where an appellant had at her disposal at the time of her retirement all of the relevant information that was then available to employees concerning the possible PPO consequences of transferring to FERS, the election to remain in CSRS could not be considered to have been due to confusion brought about by improper or inadequate information. In reaching this conclusion, the Board found that the information in the transfer handbook was accurate and straightforward, and sufficient to inform employees of the consequences of their election. It therefore held that the uncertainty attending the pending legislation did not constitute a reason beyond the appellant's control that deprived her of the opportunity to make an informed choice.

Having fully considered the instant appeal in light of the limited circumstances under which a belated election may be allowed pursuant to 5 C.F.R. § 846.204(a), as well as the timely availability to the appellant of the FERS transfer handbook, the Board concludes that the request for a belated transfer must be denied. We find that all of the issues of law raised in the instant case have been addressed and resolved in *Moriarty and Webb*, and that the facts of this case are not sufficiently distinguishable in any material aspect to require a different result. See *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980) (in reviewing an initial decision, the Board is free to substitute its own determinations of fact for those of the administrative judge,

giving his findings only as much weight as may be warranted by the record and by the strength of his reasoning), review denied, 669 F.2d 613 (9th Cir. 1982) (per curiam). The uncertainty created by the events of late 1987, although an understandable source of frustration, do not amount to circumstances beyond the appellant's control or render the election to remain in CSRS involuntary as a result of misleading or erroneous information.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.